The role of private actors in preventing work-related risks

The Role of Private Actors in Preventing Work-Related Risks: A Law and Economics Perspective

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This contribution considers the regulation of work-related risks such as industrial accidents and occupational diseases, and more specifically the role of employers and employees in the regulation and prevention of such risks. First, a law and economics perspective will be provided on the delegation of regulatory design and enforcement tasks to private actors. Thereby it will be assessed (for the specific case of work-related risks) what are the theoretical advantages and disadvantages of private regulation and enforcement compared to public regulation and enforcement, taking efficiency as a main goal. Efficiency in that respect relates to finding an optimal way of dealing with market failures, such as externalities in the form of work-related accidents and diseases. Secondly, confronting theory with practice, examples of private regulation of work-related risks will be provided for the Netherlands, which largely relies on collective labour agreements and private enforcement mechanisms. The role of liability insurers as an important potential driver of actions taken by employers and employees will be highlighted, as well as the importance of having (e.g. in administrative law) a smart mix between public law and self-regulatory mechanisms.

Keywords: work-related risks; workplace safety regulation; collective labour agreements; private regulation; private actors; smart mix; market failure; Netherlands.

1 INTRODUCTION

In the law and economics literature, one of the recurring research questions has been to what extent we need government intervention to regulate markets, and to what extent we can rely on private forms of regulation, such as contractual arrangements, private standard setting, private certification systems and self-regulation. This article will provide an overview of the relevant theoretical literature on advantages and disadvantages of private regulation. The focus will be on the regulation of *work-related* risks, more specifically the risk of being involved in an industrial accident and the risk of contracting an occupational disease. *Industrial accidents* refer to accidents happening at the workplace that cause personal injury to one or more employees. *Occupational*

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diseases are chronic ailments that occur as a result of work-related activities. Examples include Repetitive Strain Injuries (RSI), Organic Psycho Syndrome (OPS), work-related stress, lung diseases and skin diseases.[1]

The damage resulting from work-related accidents and diseases is considered by economists as a market failure, more specifically a 'negative externality' resulting from industrial activities.[2] Industrial accidents can be caused by many factors, such as the use of dangerous or defective machines, working with dangerous materials, a faulty design and location of a plant, inadequate lighting arrangements and ventilation, and many others.[3] In such cases, it is obvious that employers can influence the accident risk by investing in safety measures. However, accidents may also be caused by certain acts on the part of workers, for example when they ignore safety rules or warnings, do not wear protective clothing, operate without authority, work too fast or too slow, etc. In such cases, employees can reduce the accident risk by behaving more carefully. In many cases industrial accident settings can therefore be considered 'bilateral accident settings',[4] i.e. situations where both employers and employees have an influence on the probability and magnitude of the risk of an accident, by investing in safety measures or by behaving more carefully. To some extent this story about the bilateral nature of the risk holds also for occupational diseases. Proving that a particular disease was caused, wholly or partly, by work-related activities may however be much more difficult in case of an occupational disease than in case of an accident at the workplace. Furthermore, diseases which include subjective complaints, like stress, back pain and RSI, can be caused also by factors outside the working sphere.

Regulation of work-related risks can be aimed at prevention, compensation, or both.[5] *Prevention* of work-related accidents and diseases is the primary goal of workplace safety regulation, but it may also be achieved via the deterrent effect of liability rules or via private regulation by employers and employees. The goal of *compensation* can be achieved by liability rules, social security or no-fault compensation funds, but also by private mechanisms such as private insurance arrangements and special agreements between employers and employees (e.g. in the form of collective labour agreements, to be discussed in section 3 below). In this article I

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1 *See* e.g. the International List published by the International Labour Organization (ILO), http://www.iloencyclopaedia.org/part-iii-48230/topics-in-workers-compensation-systems/36-26-workers-compensation-systems-topics-in/work-related-diseases-and-occupational-diseases-the-ilo-international-list (accessed 3 Jul. 2018).

2 *See* s. 2 below for a brief elaboration on the concepts 'market failure' and 'externality'.

3 Http://www.yourarticlelibrary.com/industries/industrial-accidents-types-and-causes-of-accidents-explained-with-diagram/35400 (accessed 11 Oct. 2017).

4 For a definition of the concept in relation to the economic analysis of liability rules, *see* P. A. Diamond, *Single Activity Accidents*, 3 J. Legal Stud. 107–164 (1974); S. Shavell, *Strict Liability Versus Negligence*, 9 J. Legal Stud. 1–25 (1980).

5 N. J. Philipsen, *Shifts in Private and Public Regulation: The Example of Work-Related Risks* 14, Erasmus Law Lectures, 43 (The Hague: Eleven International Publishing 2018).

will explain that, from a law and economics perspective, it is often necessary to choose a 'smart mix' of these instruments, because the disadvantages of one particular instrument can then be remedied by another one. Taking the need for a smart mix of instruments into account, the research question addressed in this article is to what extent we need the government to regulate work-related risks, and to what extent private actors are willing and able to regulate such risks.

The outline of this article is as follows. The next section contains a brief overview of the theoretical economic literature on public and private regulation and the need for 'smart mixes' of regulation. In this respect, it is important to understand that for law and economics scholars 'public regulation' includes all rules formulated by government (including its administrative agencies), the enforcement of which can be via administrative or criminal law. Sections 3 and 4 consider in more detail how private actors are involved in the regulation of work-related risks by focusing on the Netherlands as an example, because in that jurisdiction employers and employees (and to some extent private insurers) play an important role in the prevention and compensation of work-related damage. In section 3, the involvement of employers and employees via collective labour agreements is discussed; section 4 discusses the role of private insurers. The aim is not to provide a full-fledged overview of the available workplace safety regulation in the Netherlands, but rather to consider particular forms of *private* regulation used in that jurisdiction. Section 5 concludes by answering the research question mentioned above.

2 PRIVATE REGULATION AND ENFORCEMENT: AN ECONOMIC PERSPECTIVE

In this section a law and economics perspective will be provided on the delegation of regulatory design and enforcement tasks to private actors. Thereby it will be assessed (for the specific case of work-related risks) what the theoretical advantages and disadvantages of private regulation are as compared to public regulation.[6] First, a general introduction into the public and private interest approaches to regulation will be provided, followed by a more specific discussion of private regulation and the need for 'smart mixes' of regulation.

2.1 A PUBLIC INTEREST APPROACH TO REGULATION

Taking allocative efficiency as a criterion, government intervention in markets can be justified if there is a 'market failure' that needs to be solved.[7] In relation to the

[6] In relation to work-related risks, public regulation in most cases refers to rules enforced via administrative law and not criminal law.

[7] Market failures refer to situations where the allocation of goods and services in a market is not efficient. A market failure can be caused e.g. by negative externalities, free rider problems, market power, and

case that is examined in this article, i.e. workplace safety, the main justification for regulatory intervention is the risk of *negative externalities*. Externalities are side effects of production or consumption that are imposed on third parties. In our example such externalities occur in the form of work-related accidents and diseases, which are side effects of productive activities. In addition, there may be a market failure resulting from the *information asymmetry* between employers and employees, e.g. caused by a lack of information about the safety of machines used from the side of the employees or about the actual behaviour at the work floor from the side of employers.

It is important to stress that even when there is a market failure, regulatory intervention is not always efficient. Economists stress the importance of comparing the costs and benefits of government intervention: if the costs of regulatory intervention outweigh the benefits (in terms of curing the market failure), it is better not to intervene. Note in this respect that the costs of regulation do not only refer to the administrative costs of formulating, implementing and enforcing the regulation, but also to costs in the form of distortions caused by regulatory intervention in other markets. Furthermore, as will be explained in more detail below, there may be situations where private parties can solve a market failure better than a public regulator, for example through private regulation or through negotiations.[8] Also, liability rules may sometimes work better than regulation, especially when the prevailing market failure is a 'small-scale' externality problem.[9] Finally, it should be pointed out that efficiency is not the only relevant policy goal that needs to be considered; and that focusing on efficiency sometimes leads to conflicts with other policy goals, like fairness, non-discrimination, or protection of vulnerable groups. In the context of workplace safety, one could e.g. imagine that a regulator would like to guarantee worker safety even when this would be extremely costly (and hence inefficient) or that a regulator aims for full compensation of all accident victims even when this requires using public funds (i.e. tax payers' money).

As a general recommendation for policy makers, it can be deduced from economic theory[10] that the efficient type of regulation is one that least interferes in the market but that is still effective in solving the prevailing

information asymmetry. For details on market failure theory, *see* A. I. Ogus, *Regulation: Legal Form and Economic Theory* (Oxford: Clarendon Press 1994); N. J. Philipsen, *Regulation of and by Pharmacists in the Netherlands and Belgium: An Economic Approach* (Antwerp: Intersentia 2003); N. J. Philipsen, *Regulation and Competition in the Legal Profession: Developments in the EU and China*, 6 J. Competition L. & Econ. 203–231 (2010); R. D. Cooter & T. S. Ulen, *Law and Economics* (6th ed., Pearson Educational International 2012).

8 *See* s. 2.2.

9 *See* S. Shavell, *Liability for Harm Versus Regulation of Safety*, 13 J. Legal Stud. 357–374 (1984); and s. 2.3 below.

10 Notably from the neoclassical and Chicago school economists, as well as the public interest literature referred to above.

market failure.[11] This is because, as mentioned above, each intervention is likely to create distortions in other markets; and competition is expected to lead to more efficient results than government planning. For example, regulating the disclosure of information or introducing certification systems would intervene less in a market than introducing minimum safety standards or licensing mechanisms. Applying this to the case of workplace safety, regulating the provision of information to employees (about the risk of accidents and occupational diseases or about the functioning of machines and equipment) would be less 'interventionist' than prescribing the use of particular machines or safety measures, but the former would only be sufficient if employees understand the information that is provided to them and can act rationally on the basis of that information. Also, if we would like to safeguard a minimum safety level of industrial production, certification mechanisms interfere less with the market system than licensing because they do not exclude any firms or products from the market, but certification – because of its voluntary character – will likely not suffice to solve the most serious problems of information asymmetry and externalities, for example when employers can abuse their information or power advantage over employees, by requiring them to work extra hours or in dangerous conditions.

2.2 A private interest approach to public regulation

The rosy picture presented in the previous section, where the government is always willing and able to act in the public interest, of course may not hold in reality. After all, just like any other individuals, politicians are utility maximizers, and this may imply that, besides serving public goals, they may be interested also in maximizing power, the size of their bureaucracy, the number of votes (in order to be re-elected), financial gains that can be obtained from lobbying groups, etc. Regulation is a powerful tool that can be used for this purpose by politicians, because there is often a specific demand for it by special interest groups.[12] The latter may either lobby for the introduction of protective regulation (if they are the insiders in the market) or for more lenient regulation (in cases where that would

[11] Philipsen, *supra* n. 5, at 11.

[12] G. J. Stigler, *The Theory of Economic Regulation*, 2 Bell J. Econ. & Mgmt. Sci. 3–21 (1971); R. A. Posner, *Theories of Economic Regulation*, 5 Bell J. Econ. & Mgmt. Sci. 335–358 (1974); S. Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & Econ. 211–240 (1976). For a summary of the literature, *see* Philipsen (2003), *supra* n. 7; and F. Boehm, *Regulatory Capture Revisited – Lessons from Economics of Corruption* (2007), http://www.icgg.org/downloads/Boehm%20-%20Regulatory%20Capture%20Revisited.pdf (accessed 3 Jul. 2018).

lower their compliance costs). The risk of so-called 'rent seeking behaviour' by private interest groups[13] and the risk of corruption[14] and bribery both add to the potential costs of regulation, and need to be taken into account when regulation is compared with other instruments. Rent-seeking behaviour is clearly detrimental for society because of the simple fact that resources (like time and money) are wasted on generating wealth transfers between groups, rather than for the creation of a genuine benefit to society. Nevertheless, some scholars, including Gary Becker, have argued that the end result of the lobbying process may sometimes be considered efficient, depending on the particular interest groups involved and the distribution of (lobbying) power among those groups.[15]

In the context of workplace safety, obvious private interest groups include employers (employers' associations, and industry-specific lobby groups) and groups representing employees, such as labour unions. However, there may be other interest groups involved in the lobbying process, for example patient groups representing the interests of victims of a particular occupational disease, groups of tort victims, and producers lobbying for the use of their safety equipment.

2.3 Possible advantages of private regulation

Regulating a market failure is not necessarily a task for public agencies. The law and economics literature has discussed three possible advantages of private forms of regulation over public regulation.[16] Private regulation in that respect may include, for example, certification schemes, private standard setting, and forms of self-regulation. Among the theoretical advantages presented in the literature, there is one that has remained relatively undisputed, which is the argument that private parties generally have better information on the activities that need to be regulated and the risks involved in those activities than public authorities, or can achieve that information at lower costs than public authorities. In those situations, the information advantage of private parties would be a clear argument for self-regulation over public regulation and for (private) certification systems over (public) licensing systems.[17] However, it is not self-evident

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[13] A. Krueger, *The Political Economy of the Rent-Seeking Society*, 64 Am. Econ. Rev. 291–303 (1974); J. M. Buchanan, R. D. Tollison & G. Tullock, *Toward a Theory of the Rent-Seeking Society* (College Station: Texas A&M Press 1980).

[14] For a categorization of different forms of corruption *see* J. C. Andvig, O-H Fjeldstad, I. Amundsen, T. Sissner & T. Soreide, *Research on Corruption: A Policy Oriented Survey* (Bergen: Chr. Michelsen Institute 2000); and Boehm, *supra* n. 12.

[15] G. S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. Econ. 371–400 (1983).

[16] J. C. Miller, *The FTC and Voluntary Standards: Maximizing the Net Benefits of Self-Regulation*, 4 Cato J. 897–903 (1985); A. I. Ogus, *Rethinking Self-Regulation*, 15 Oxford J. Legal Stud. 97–108 (1995); Philipsen (2003), *supra* n. 7; R. Van den Bergh, *Towards Better Regulation of the Legal Professions in the European Union*', Rotterdam Institute of Law and Economics Working Paper Series, No. 2008/07 (2008).

[17] There is an extensive economic literature on the choice between certification and licensing. An important conclusion from this literature is that the heterogeneity of preferences (e.g. for quality or

that all relevant information is shared by private parties, especially if this may harm business interests, for example in case of confidential information.

A second potential argument in favour of private regulation is that it may be less bureaucratic than public regulation, in that it is easier to change and therefore more suitable in dynamic markets, where innovation is important and where consumer preferences change quickly.[18] Changing public regulation may take a long time indeed, as it means having to go through various procedures and sometimes having to make political compromises. While this 'flexibility' argument in favour of private regulation may hold true in several cases, it depends on the specific type of private regulation whether it is really more flexible than public regulation. For example, while most forms of self-regulation are relatively flexible indeed, this may not be true for private certification systems when comparing them to (public) licensing, especially when private accreditation bodies have been assigned to monitor the behaviour of certification bodies. Furthermore, from the private interest perspective introduced above, one could easily argue that some certifying bodies – namely, those that are not sufficiently independent from the parties they regulate – will only change their regulation when this would serve private interests.

A third argument that has been advanced in the literature in support of private regulation is that it is less costly than public regulation.[19] This argument relates more particularly to the 'compliance costs' of regulation. That is, there may be a greater willingness to comply with rules formulated and enforced by one's peers than rules formulated and enforced by government agencies far away. It has also been argued that private bodies bear some of their own costs, while the formulation and enforcement of public regulation needs to be financed by tax payers' money. However, that would only be true if private regulators are unable to pass on the costs of regulation to the final consumers or customers via the prices of their products or services.

Applying the above arguments to the example of work-related risks, the first criterion (who has the information advantage?) may point in two directions. For most small scale accidents and more 'obvious' cases of occupational diseases,

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safety) is one of the relevant factors impacting the decision whether licensing or certification should be applied to solve an information problem. After all: licensing results in products or services being excluded from the market, even if some consumers might have wanted to buy them, while certification (under the condition that there is still competition in the market) does not have this effect. C. Shapiro, *Investment, Moral Hazard and Occupational Licensing*, 53 Rev. Econ. Stud. 843–862 (1986); S. Svorny, *Licensing, Market Entry Regulation*, in *Encyclopedia of Law and Economics, Volume III: The Regulation of Contracts* 296–328 (Cheltenham, UK and Northampton, MA: Edward Elgar 2000).

[18] Miller, *supra* n. 16, at 897–898. Note that this 'flexibility' argument can also be interpreted as an argument in favour of (generally defined) standards over hard rules. For a discussion of the 'rules versus standards' debate, *see* L. Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 Duke L.J. 557–629 (1992); and F. Weber, *European Integration Assessed in the Light of the 'Rules vs. Standards Debate'*, 35 Eur. J.L. & Econ. 187–210 (2013).

[19] Miller, *supra* n. 16, at 897–898; Philipsen (2003), *supra* n. 7, at 39.

information on how best to prevent these accidents and diseases will lie with the employers and (sometimes) employees involved; which points at least to some involvement of private actors in the regulatory mix. However, it is likely that information on how best to prevent and regulate certain accidents and occupational diseases needs to be acquired through further research, some of which may need to be funded with public money. The second and third criteria, i.e. flexibility and cost advantages of private regulation, apply more generally and may hence also be relevant arguments for the involvement of private actors in the regulation of work-related risks. Nevertheless, we need to remember that leaving regulation in the hands of private parties may bring with it the possibility that to some extent private interests may be served at the expense of the public interest. That explains why in the literature 'conditioned self-regulation', where there is some public supervision on self-regulating agencies, has been advocated.[20] Such conditioned self-regulation (or co-regulation) seems like the best of both worlds – having the information advantage of self-regulation with a reduced possibility of rent seeking behaviour by self-regulatory agencies – but it may be at the expense of losing flexibility and cost advantages, the other two criteria introduced above. This argument may apply also in the context of private certifying bodies monitored by a (semi-) public accreditation body.

In addition to the risk of rent seeking behaviour, the theoretical literature presents two other disadvantages of private regulation. One problem is that private regulation – irrespective of whether it concerns private certification systems, private standard setting or pure self-regulation – may lack the appropriate enforcement and sanctioning mechanisms needed to bring on board also the 'bad apples' in the group.[21] Especially in the case of work-related risks, where regulation is aimed at a widely varying group of firms/employers, this argument may be relevant. Second, it can be argued that some forms of private regulation lack democratic legitimacy, because private bodies are often not accountable through the regular democratic channels and there is no control on the contents of the regulation by democratically elected Parliaments.[22] Lytton (2015), however, presents two examples of private certification systems that compare favourably to government regulation also on the criterion of legitimacy.[23]

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[20] E.g. W. H. Van Boom, M. G. Faure, N. J. H. Huls & N. J. Philipsen, *Handelspraktijken, Reclame en Zelfregulering* (The Hague: Boom Juridische uitgevers 2009); S. Gilad, *It Runs in the Family: Meta-Regulation and its Siblings*, 4 Reg. & Governance 485–506 (2010).

[21] Van Boom et al., *supra* n. 20, at 96–99.

[22] Van den Bergh, *supra* n. 16, at 8.

[23] The examples relate to the United States and concern fire safety and kosher food. *See* T. D. Lytton, *Competitive Third-Party Regulation: How Private Certification Can Overcome Constraints That Frustrate Government Regulation*, 15 Theoretical Inquiries L. 539–572 (2015).

2.4 Finding 'smart mixes' of regulation

The concept of 'smart regulation' was introduced by Gunningham, Grabosky and Sinclair in 1998 in relation to environmental regulation and has been widely adopted since, leading more recently to various publications on the related and extended concept of 'smart mixes'.[24] The optimal response to any market failure often involves using a 'smart mix' of instruments rather than one single instrument. Such mix may consist of public regulation (command and control, enforced via administrative and criminal sanctions), liability rules, market-based instruments (like taxation and 'cap and trade' mechanisms) and 'private regulation'. Weaknesses of one particular instrument in the mix may then be covered by the inclusion of another regulatory instrument. In the previous section the examples were provided of conditioned self-regulation and monitoring by accreditation bodies, where some advantages of private regulation in terms of information (and maybe flexibility and cost reductions) can be taken on board, while the involvement of public monitoring reduces the risk of rent seeking behaviour and the lack of democratic legitimacy.

Another interesting example of discussions on smart mixes relates to the often-discussed question (in the law and economics literature) of how one can 'smartly' combine public regulation and private law rules on liability in order to deal with externality problems. Already in 1984, Shavell found that liability rules in some situations may have some weaknesses, in that they do not give sufficient incentives for an optimal reduction of the accident risk. For one, there needs to be a credible threat of a lawsuit for liability rules to have a deterrent effect on parties causing the externality. If such credible threat is not present – for example because it is difficult to prove a causal link or because the damage is spread over many victims – it will be difficult for victims to bring a law suit. This may indeed be true for some work-related risks, more specifically occupational diseases that can be caused by factors both inside and outside the working sphere, like work-related stress and RSI. Second, if the party causing the externality does not have sufficient resources to compensate the victims, again liability rules may lack sufficient deterrent effect. This may also be true in some cases, where employers are small firms and where insurance[25] is not

[24] *See* N. Gunningham, P. Grabosky & D. Sinclair, *Smart Regulation: Designing Environmental Policy* (Oxford University Press 1998); and *see* the literature quoted in the forthcoming book: *Smart Mixes in Relation to Transboundary Environmental Harm* (J. Van Erp, M. G. Faure, A. Nollkaemper & N. J. Philipsen eds, Cambridge University Press 2018). A different but related topic is 'smart enforcement'.

[25] Insurance is a crucial instrument in any regulatory mix, not only for the purpose of compensation but also for prevention/deterrence. It will then become crucial for insurers to cure problems of moral hazard, which may arise because the risk of accidents is (wholly or partly) shifted from the insured parties to insurers. *See* further below, s. 4.

available. In such situations, according to Shavell,[26] liability rules alone cannot deal with externality problems, so public regulation – because it can prohibit certain behaviour or prescribe certain investments in safety *ex ante* – should be added to the 'smart mix'.[27]

It goes beyond the scope of this article to discuss all possible mixes of regulation and other instruments aimed at preventing and compensating for work-related risks. Instead, the following sections will consider in more detail the potential contributions of private regulation and private insurance to the 'smart mix', based on the example of regulation of work-related risks in the Netherlands.

3 PRIVATE REGULATION OF WORK-RELATED RISKS IN THE NETHERLANDS: COLLECTIVE LABOUR AGREEMENTS

The Dutch labour market is known for its 'polder model', which is based on finding consensus and avoiding conflicts through extensive negotiations between employers, employees and government agencies. This cooperation between the three parties is formally embodied in the Social-Economic Council (SER), which serves as the (physical and institutional) platform where representatives of employers' organizations, labour unions and government meet to discuss e.g. wages, pensions, and working conditions.

A special feature of the Dutch polder model is the so-called 'collective labour agreement' (CAO). This is an agreement at sectoral level between employers (or associations representing employers) and trade unions. CAOs apply directly to all members of the respective trade unions and employers' associations.[28] The government is formally not a party to such agreements, but can declare a CAO binding on a sector.[29] Provisions on health and safety of employees and compensation for employees who suffered work-related damage may also become part of CAOs. In a recent Dutch study for *Stichting Instituut GAK* on compensation for work-related risks many examples of collective labour agreements were found that contained additional provisions on compensation for victims of work-related risks.[30] The

[26] There may be others, related to information problems or costs. *See* Shavell, *supra* n. 9.

[27] Note that often regulation alone will not be able to deal with externalities either, because of the earlier-mentioned problems inherent to public regulation: its contents may be influenced by private interest groups, it may not be suitable in highly dynamic markets (which may hence be interpreted as an argument for liability rules *or* self-regulation), and it can be difficult or costly to enforce.

[28] In case of a minimum CAO, an employer may deviate from an agreement only if that would be to the benefit of its employees. *See* the official website of the Dutch government, https://business.gov.nl/regulation/cao/ (accessed 3 Jul. 2018).

[29] *Wet op het algemeen verbindend en het onverbindend verklaren van bepalingen van collectieve arbeidsovereenkomsten* of 25 May 1937, Art. 2.

[30] S. Klosse, M. Driessen, W. Eshuis, N. Gundt & N. J. Philipsen, *Schadecompensatie bij Beroepsrisico's: Hoe Krijgen We Dat ILO-proof?* 100–119, Report for Stichting Instituut GAK (Maastricht: Maastricht

authors of the study found that there was quite some variation in the level of additional compensation offered to employee-victims across the different industry sectors, and the conditions under which these additional benefits can be obtained.[31] They concluded therefore that – if the policy goal is to achieve a minimum compensation of *all* employee-victims – CAOs are a good but not perfect instrument of compensation.[32] From an economic perspective, however, one could argue that differences in compensation represent the different risks involved in the different sectors, and may hence be the result of 'efficient' negotiations.

The existence of these collective labour agreements clearly show that private forms of regulation can play an important role in the 'smart mix' of regulating work-related risks. By allowing CAOs, the Dutch regulator can benefit from the information advantage of private parties over government agencies, while providing 'state protection' for employees by the possibility of declaring the CAOs binding – and monitoring the enforcement of these agreements. CAOs are also a relatively flexible instrument, at least in theory; in practice some of this flexibility gets lost when the agreements are declared generally binding for a certain time period, which generally is two years; prolongation after that period is possible.[33] Finally, the problem of lack of democratic legitimacy is addressed by having relevant stakeholders involved in the regulatory process.

It should be stressed here that the CAOs provide *additional* compensation for employee-victims. Public regulation in the form of social insurance arrangements applies generally to all employees,[34] while there is a possibility to take out additional (private) insurance for personal injury loss beyond the state-provided minimum, and there is a possibility of filing a claim against one's employer.[35] Of

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University 2015). A few CAOs also contained provisions on the employment of workers with minor disabilities ('*35-minners*'). Two hundred CAOs were selected for the empirical study: the 100 biggest CAOs (in terms of covering the largest sectors and undertakings) and 100 randomly selected CAOs among the remaining 600 smaller ones.

31 Klosse et al., *supra* n. 30, at 117–118.

32 Klosse et al., *supra* n. 30, at 118–119. The context of the study was to check whether Dutch rules on compensation for employee-victims comply with the minimum norms of the ILO. The instrument of CAOs does not cover all possible victims (*see* at 120–121 of the report for details).

33 Art. 2 (2) of the Wet avv provides a maximum period of 'generally binding' provisions of two years; with an exception only for provisions concerning funds, where the maximum number is five years.

34 A substantial part of the salary for the first two years of absence due to sickness needs to be provided by the employer; which leads to the social insurance mechanism (*WAO*) having some preventive effects. For details, *see* S. D. Lindenbergh, *Employers' Liability and Workers' Compensation: The Netherlands*, in *Employers' Liability and Workers' Compensation* 351–368 (K. Oliphant & G. Wagner eds, Göttingen: De Gruyter 2012). The study by Klosse et al., *supra* n. 30, highlighted that the category of self-employed workers may face difficulties in receiving compensation. The same applies to victims of occupational diseases who cannot prove causation (linking the disease to the workplace) or who face difficulties having the disease formally recognized.

35 Lindenbergh, *supra* n. 34, at 355–363. However, very few claims (about 5%) reach the courts. Philipsen, *supra* n. 5, at 17–19, summarizes the conclusions of a Dutch empirical study (W. Eshuis, M. Schaapman, N. J. Philipsen, J. Popma, G. Van der Laan, J. G. Bakker & B. Sorgdrager, *Leerzame*

course, there is also public health and safety regulation aimed directly at the prevention of accidents and diseases, most prominently in the form of the Working Conditions Act (*Arbowet)*.[36] The success of public regulation depends crucially on the enforcement of such regulation. If there is no monitoring of companies by e.g. a Labour Inspectorate, we cannot expect the 'bad apples' among those companies to comply with health and safety standards. According to a Dutch empirical study on 'worst case scenarios', in which victims of OPS and RSI were interviewed, it are especially small companies who are rarely visited by a Labour Inspectorate that are likely to be involved in these worst cases.[37] The importance of well-defined legal obligations and monitoring by a Labour Inspectorate is stressed also by the recent European Survey of Enterprises on New and Emerging Risks (ESENER), which lists the main reasons to comply with Occupational Health and Safety (OHS) regulation.[38] Nevertheless, some of these monitoring tasks may also be taken up by private actors. In the Netherlands, since 2007 the above-mentioned Working Conditions Act allows employers to carry out certain activities that impact on labour conditions themselves, provided that one or more 'prevention workers' (*preventiemedewerkers*) are installed – employees who are actively involved in the prevention of risks at the company level. Supervision remains in the hands of the Inspectorate of the Ministry of Social Affairs and Employment, which also has the possibility to impose (substantial) fines.[39]

4 PRIVATE REGULATION OF WORK-RELATED RISKS IN THE NETHERLANDS: THE ROLE OF INSURERS

In the discussions above, one group of private actors that plays an important role in the 'smart mix' of regulating work-related risks has largely been ignored: private insurers.[40] While it is immediately clear that insurance mechanisms make up an important part of the *compensation* of victims of accidents and occupational diseases,

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Schadeclaims: Leren van 'worst case scenarios' als opstap naar effectieve interventie en preventie rond beroepsziekten, Hugo Sinzheimer Instituut / Nederlands Centrum voor Beroepsziekten / METRO – Maastricht University / Nederlandse Vereniging voor Arbeids- en Bedrijfsgeneeskunde (2009)) on the motives employee-victims had to file such claims against their own (former) employers.

36 In full: *Arbeidsomstandighedenwet*. This Act was thoroughly revised in 2005 (implemented in 2007), with the aim of having employers and employees more closely involved in the monitoring of workplace safety, and again in 2017.

37 Eshuis et al., *supra* n. 35.

38 *Second European Survey of Enterprises on New and Emerging Risks (ESENER-2)* (2014). *See* website EU-OSHA, https://osha.europa.eu/en/surveys-and-statistics-osh/esener (accessed 3 Jul. 2018).

39 Lindenbergh, *supra* n. 34, at 366. *See also* https://www.de-arbodienst.nl/ (accessed 3 Jul. 2018). There is also a specific role for company doctors (*bedrijfsartsen*).

40 The private insurance market in this respect needs to be distinguished from any social insurance, e.g. in the form of social security.

economic theory also stresses the importance of insurance in the *prevention* of accidents and diseases.[41] After all, the availability of insurance implies that employers (or in some cases employees) face lower financial risks in case of an accident or disease, which is likely to reduce their incentives to prevent such accidents or disease. This is the well-known problem of moral hazard. If the risk of having to bear any resulting damage is shifted wholly or partly to insurers, the latter need to be able to control this moral hazard risk. If insurers have sufficient information about the characteristics and behaviour of their insured and are able to monitor their behaviour, they can classify risks and adapt premiums accordingly or they can impose deductibles or upper limits on insurance benefits; preferably such premium differentiation should take place at the level of the company.

In the Netherlands, as in England and Wales,[42] compensation for work-related harm beyond the basic levels provided by social insurance can be obtained via private insurance mechanisms or via the 'lottery' of tort law, by holding one's employer liable. Unlike the situation in England and Wales, there is no mandatory insurance mechanism for employers in the Netherlands, although political and academic discussions about the need to introduce (full or partial) compulsory first party insurance for work-related health risks return to the fore repeatedly.[43] Employers can take out *voluntary* insurance for damage caused by work-related risks, as these risks are covered by the general liability insurance for companies (*AVB*).[44] Also employees can insure themselves in the private market against damage that is not covered by the social insurance.[45] The insurance companies involved sometimes offer services related to prevention and cost reduction, and in that respect – at least theoretically – can play an additional role not only in the compensation, but also in the prevention of work-related accidents and diseases. Developments in England and Wales teach us that insurers may be able to do this

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41 S. Shavell, *On Moral Hazard and Insurance*, 93 Q.J. Econ. 541–562 (1979); M. G. Faure, *The Limits to Insurability from a Law and Economics Perspective*, 20 Geneva Papers on Risk and Insurance 454–462 (2005).

42 In England & Wales employer liability for work-related risks is combined with a mandatory insurance for employers. The Employers' Liability (Compulsory Insurance) Act of 1969 prescribes that employers have to take out liability insurance against the costs of compensation for employees who are injured or made ill at work through the fault of the employer. If they do not, they may face serious criminal fines. For details, *see* R. Lewis, *Employers' Liability and Workers' Compensation: England and Wales*, in *Employers' Liability and Workers' Compensation* 137–202 (K. Oliphant & G. Wagner eds, Göttingen: De Gruyter 2012).

43 Lindenbergh, *supra* n. 34, at 367; for a detailed analysis of the possible insurance solutions *see* Klosse et al., *supra* n. 30, at 141–156.

44 More than 50% of companies have such insurance. Lindenbergh, *supra* n. 34, at 364–365 discusses some limitations of the AVB in terms of coverage.

45 There are many insurance companies offering liability insurance for companies (*AVB*) and disability insurance for private parties (*arbeidsongeschiktheidsverzekering*. Websites (in Dutch) comparing different insurance policies are available for private disability insurance: *see* e.g. https://www.aovergelijken.nl (accessed 3 Jul. 2018).

by monitoring the OHS management of companies and providing recommendations to lower risks, in addition to diversifying premiums based on industry risk, previous claims history and size of the wage roll. Some commentators have however been critical of the possibilities for insurers in England and Wales to differentiate premiums at the level of the individual company.[46]

There is some empirical evidence from various jurisdictions on possibilities for insurers to control moral hazard problems in the area of work-related risks and the effects this has on the prevention of industrial accidents and occupational diseases, which comes up with mixed results – although most studies appear to find a positive effect.[47] It seems safe to assume that the regulator should provide sufficient incentives for insurers to diversify risks via premiums, as well as sufficient options to monitor the behaviour of the insured companies.

5 EVALUATION AND CONCLUSIONS

From the theoretical discussion in section 2 several economic (efficiency) arguments supporting the involvement of employers and employees in the regulation of work-related risks can be deduced. Most prominent among these are the *informational advantages* held by private actors, which make it possible to arrange prevention and compensation at industry or sectoral level, or even at the level of the company – although there is always a risk that not all information is shared by employers. Another advantage of (most forms of) private regulation is its *relative flexibility*, which is an important asset in dynamic markets, as was shown by the example of *CAOs* discussed in section 3. Whether there is also a *cost advantage* of private regulation can only be determined on the basis of empirical research into actual costs, although it is likely indeed that the costs of complying with new/changed regulation are lower under private regulation. The two main disadvantages of private regulation – lack of democratic legitimacy and the risk that the regulation serves private interests rather than the public interest – can potentially be addressed by involving all relevant stakeholders early on in the regulatory process, as was shown again by the example of the *CAOs* in the Netherlands, or by involving accreditation agencies.

Returning to our central research question defined in section 1, we can answer it by stating that there remains an important role to be played by administrative agencies in the regulation of work-related risks, notably in the enforcement of such regulation (in terms of monitoring the outcomes of private negotiations, e.g. via co-regulation, and sanctioning violations) and in tracking

[46] Lewis, *supra* n. 42, at 194–197 and 200. *See also* https://www.healthandsafetyatwork.com/content/employers-liability-insurance-explanation (accessed 3 Jul. 2018).

[47] Philipsen, *supra* n. 5, at 23–25.

down and regulating 'bad apples' that are not included in private forms of regulation. Again, the example provided in section 3 illustrates that the Dutch administration is trying to achieve such 'smart mix' of public and private regulation through public supervision (inspections and fines) and by making employers financially responsible for damage caused by work-related accidents and diseases. Of course, the difficulties lay in defining optimal sanctions for violations of labour safety conditions and in finding a cost-efficient and effective way of organizing inspections of companies – both are points that could not be addressed within the scope of this article.

Another group of private actors that is willing and potentially able to be involved in the smart mix of regulating work-related risks is the group of private insurance companies, as was discussed in section 4. Private insurers can be an important driver of actions taken by employers and employees, to the extent that they are allowed to offer company liability insurance and/or first party insurance for employee-victims against work-related harm. In the Netherlands and in England and Wales, where employer liability in tort law plays a substantial role in the compensation of victims (and hence indirectly in the prevention of harm) many private insurers offer such policies. It is in their own interest to try to keep costs down and to reduce the so-called 'moral hazard' risk described in this article, by actively monitoring the behaviour of employers and employees, and to come up with strategies to further prevent accident risks.